

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 372 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?
Nos. 1 to 5 No.

BHAYA BHIKHA KOLI

Versus

BAI CHOTHI GANESH KOLI

Appearance:

MR PM RAVAL for Petitioners

MR SURESH M SHAH for Respondent No. 1, 2

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 04/02/98

ORAL JUDGEMENT

This is plaintiffs Second Appeal arising out of following facts.

The case of the plaintiff was that the land was occupied by their ancestors from erstwhile Bhavnagar State. In due course of time some constructions were raised and the defendant no.1 was permitted to occupy a portion of the construction as licensee. Defendant no.1

however pulled down the construction and threatened to raise new construction. Objection was raised which was not heeded. Hence, the suit was filed by the plaintiffs for declaration that they are owners of the land in dispute. They also prayed for consequential relief that the defendants be restrained from interfering with their possession over the same and also from raising any construction thereon.

Suit was resisted by the defendants on the ground that disputed land belongs to them and that the plaintiffs are not the owners of the same and that the defendants were never licensees of the disputed land.

The Trial Court dismissed the suit observing that the plaintiffs failed in establishing their title to the land in dispute. Thereafter, an appeal was preferred which was dismissed. The lower Appellate Court concurred with the finding of the Trial Court, hence this Second Appeal.

Following substantial questions of law were formulated in this Second Appeal :

- (1) Whether the lower appellate Judge was bound to examine the Commissioner's notes.
- (2) If yes, whether he has failed to consider the same.

The learned Counsel for the parties were heard. Learned Counsel for the appellants raised another question though not formulated at the time of admission of the appeal, that the judgment of the Appellate Court is in violation of Order 41 Rule 31 of the Code of Civil Procedure. Learned Advocate for the Appellants referred 3 cases in support of her contention.

- (1) AIR 1975 (Bom) 278.
- (2) AIR 1985 (Bom) 102.
- (3) AIR 1991 (Gauhatti) 100.

These cases are distinguishable on facts. On mere technical ground the judgment of the First Appellate Court is not to be interfered with. The points laid down in these cases are that if the lower Appellate Court does not decide the points of controversy involved in the case such judgment need not be sustained. After examining the judgment of the lower Court I find that it has specifically mentioned that what was the point for

adjudication before him and after examining the oral and documentary evidence he returned finding. It is not obligatory for the lower Appellate Court to frame issues as is done during trial. The points which were raised for determination before the Appellate Court were formulated and determined in accordance with law. Thus, on this new ground argued at the time of final hearing of this Appeal the judgment of the lower Appellate Court cannot be interfered with.

Coming to the two substantial questions of law formulated and referred to above I find that these hardly arise. The judgment of the lower Appellate Court recites in para 5 that he had considered the Commissioner's report, Exhibit 35 in Appeal. It appears from the record that one Commissioner was appointed during trial who prepared map and report. Another Commissioner was appointed in Appeal who submitted map and report Exhibit 35 as an additional evidence. Both the reports were considered. Since it was a case of concurrent judgment the lower Appellate Court was not bound to give more detailed reasons than have been given in the impugned judgment. In another place in the judgment in para 6 the lower Appellate Court has observed that the plaintiffs placed reliance upon maps prepared by the Commissioner, one before the Trial Court and another before the Appellate Court. That also shows that the lower Appellate Court has applied its mind and considered two maps and reports prepared by two Commissioners and as such it is not a case where the lower Appellate Court rendered judgment ignoring material evidence on record.

It is needless to say that the real controversy between the parties is as to whether the plaintiffs are the owners of the disputed land or the defendants. Map and report of the Commissioner are not substantive evidence on title. The Commissioner was appointed only for making spot inspection and submitting map and report indicating specific position existing at the spot. Beyond that he had no authority to adjudicate upon question of title. The respective contentions or the rival contentions of the parties is as to which party is the owner of the disputed land. This controversy is to be decided by the Court and not by the Commissioner. The learned Counsel for the appellants argued that the Commissioner appointed in Appeal made specific observations in his report that the defendants made encroachment over the land of the plaintiff. If that is so then this was also unauthorised report and the Commissioner has exceeded his jurisdiction in making such observation. It was not a case where the real

controversy was whether the defendants have encroached upon the plaintiffs land or not. Moreover if the title of the plaintiffs in the land in suit was in controversy when the Commissioner went to the spot his observation on this point becomes meaningless. Moreover on the face of the finding recorded by the two Courts below that the plaintiffs have failed to establish their title in the land in suit, the question of encroachment by the defendants over the plaintiffs land becomes foreign to the scope of the controversy involved in the suit as well as in the appeal.

In the result it is incorrect that the maps and reports of the Commissioner were not considered by the lower Appellate Court. These two questions are therefore answered accordingly.

Title to the land was rightly determined by both the courts on proper appreciation of oral and documentary evidence on record. Exhibit 120 was the deed on which the plaintiffs placed reliance to establish their title in the land. Exhibit 126 was the deed relied upon by the defendants in support of their case. The lower Appellate Court categorically observed that Exhibit 120 does not relate to the disputed land and that the plaintiffs from the oral evidence also failed to establish their title in the land in suit. This finding of fact also does not suffer from any misappreciation of evidence on record or error of law.

There is no merit in this Appeal which is hereby dismissed. Parties to bear their own costs.

m.m.bhatt